BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 3300 through 3310,

As Added and Amended by Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675; and

Filed on December 21, 1995;

By the City of Sacramento, Claimant.

NO. CSM 4499

Peace Officers Procedural Bill of Rights

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ. ; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted November 30, 1999)

STATEMENT OF DECISION

The attached Statement of Decision of the Cornmission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on December 1, 1999.

Paula Higashi

Paula Higashi, Executive Director

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(Adopted** November **30, 1999)

STATEMENT OF DECISION

On August 26, 1999 the Comrnission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Ms. Pamela A. Stone appeared for the City of Sacramento. Mr. Allan Burdick appeared for the League of California Cities/SB 90 Service. Ms. Elizabeth Stein appeared for the California State Personnel Board. Mr. James Apps and Mr. Joseph Shinstock appeared for the Department of Finance. The following persons were witnesses for the City of Sacramento: Ms. Dee Contreras, Director of Labor Relations, and Mr. Edward J. Takach, Labor Relations Officer.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Cornmission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 5 to 1, approved this test claim.

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BACKGROUND

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California. "

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts. [1] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[2] and peace officers on probation who have not reached permanent status .[3]

COMMISSION FINDINGS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[4]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required

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[1] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[2] Gray v. *City* of *Gustine* (1990) 224 Cal.App.3d 621; *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795.

[3] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643; *Barnes v. Personnel Department of the City of El Cajon (1978) 87* Cal.App.3d 502.

[4] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[5]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, the Commission found that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the Commission determined that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognized, however, that several California courts have analyzed the test claim legislation and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution.* . . . . The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements,* which must afford the officer a chance to refute the charges or clear his name. " (Emphasis added .)[6]

Thus, the Commission continued its inquiry and compared the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

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[5] *County of Los Angeles v. State of California (1987) 43* Cal.3d *46, 56; Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, *537; City of Sacramento v. State of California* (1990) 50 Cal.3d 51, *66; Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[6] *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.

The Commission also considered whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, the Commission recognized that Government Code section 17556, subdivision (c), is triggered. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation. "[7]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law. "[8] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. "[9]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary

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[7] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district. "

[8] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[9] *Board of Regents v. Roth* (1972) 408 U.S. 564, 577.

measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment. [10]

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed", demoted[12], suspended[13], receives a reduction in salary[14] or receives a written reprimand. [15,]

The Department of Finance and the State Personnel Board contended that due process property rights attach when an employee is transferred. They cited *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.

The Commission disagreed with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay* . The court did not address the situation where the employee receives a transfer alone. [16] In addition, in *Howell v. County of San Bernardino,* the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment. "[17] Thus, the Comrnission found that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, the Commission found that that the SPB decision does not apply to actions taken by a local government employer. .

Accordingly, the Commission found that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California

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[10] *Slochower v. Board of Education* (1956) 350 U.S. 55 1, where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert v. Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[11] *Skelly, supra,* 15 Cal.3d 194.

[12] *Ng. v. State Personnel Board* (1977) 68 Cal. App. 3d 600.

[13] *Civil Service Assn. v. City and County of San Francisco (1978) 22* Cal.3d 552, 558-560.

[14] *Ng, supra,* 68 Cal.App.3d 600, 605.

[15] *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438.

[16] *Runyon v. Ellis* (1995) 40 Cal.App.4th 961.

[17] *Howell v. County of San Bernardino* (1983) 149 Cal.App.3d 200, 205.

Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and
- The right to respond, either orally or in writing, to the authority initially imposing discipline. [18]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter.* [19]

Similarly, the Commission found that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[20]

The claimant disagreed with the Comrnission's interpretation of the *Stanton* case and its application to written reprimands.

The claimant contended *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concluded that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cited the following language from *Stanton* in support of its position:

> "... As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted] ; suspended without pay [citations omitted] ; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued. "
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> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee. "

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the

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[18] *Skelly, supra,* 15 Cal.3d 194, 215.

[19] *Civil Service Assn., supra,* 22 Cal.3d 552, 564.

[20] *Stanton, supra,* 226 Cal.App.3d 1438, 1442.

police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

The Commission agreed that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly* , the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

However, the court found that the employee *is* guaranteed due process protection upon receipt of a written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly , plaintiff's *procedural due process rights,* following a written reprimand,' ***are protected*** by the appeals process mandated by Government Code section 3304, subdivision (b). " (Emphasis added .)[21]

Accordingly, the Commission found that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge

[21] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

against him that might seriously damage his standing and associations in the community, ' such as a charge of dishonesty or imrnorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. ' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as,. . .employment. [Citations omitted.] "[22]

For example, in *Murden v. County of Sacramento,* the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[23]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[24]

Accordingly, the Commission found that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the Comrnission found that the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

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[22] *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 308, quoting from *Board of Regents v. Roth, supra, 408 U.S.* at p. *573. See* alsd *Paul v. Davis* (1976) *424* U.S. 693, *711-712;* and *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340.

[23] *Murden, supra,* 160 Cal.App.3d 302, 308.

[24] *Murden, supra,* 160 Cal.App.3d 302, 310; *Arnett* v. *Kennedy* (1974) 416 U.S. 134, 157; and *Codd v. Velger* (1977) 429 U.S. 624, 627.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal. "[25]

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[26], written reprimand, or transfer for purposes of punishment. "

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions .[27] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance, " however, an appeal is not required.[28, 29]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career. [30] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under. the test claim legislation

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[25] In the Claimant's comments to the Draft Staff Analysis, the claimant recited Government Code section 3304, as *amended in I997 (Stats. 1997, c. 148) and 1998 (Stats. 1998,* c. *786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. The Commission noted that ***neither the 1997 nor 1998 statutes are alleged in this test claim.***

[26] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade *(Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank *(White v. County of Sacramento* (1982) 3 1 Cal. 3d 676, and probationary rank *(Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250.

[27] *White v. County of Sacramento* (1982) 31 Cal.3d 676.

[28] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga v. City of San Diego* (1979) 94 Cal.App.3d *756; Orange County Employees Assn., Inc. v. County of Orange* (1988) 205 Cal.App.3d 1289.

[29] The claimant testified that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant stated that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken.

[30] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White v. County of Sacramento* (1982) 31 Cal.3d 676, 683.

based on the source of the report, its contents, and its potential impact on the career of the officer.[31]

The Commission recognized that the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[32] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process .[33, 34]

The Department of Finance and the State Personnel Board contended that Governrnent Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cited Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has *successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal. "

However, the Commission determined that the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal. "

Accordingly, the Commission found that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 3 1, 1998.

The Department of Finance also contended that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

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[31] *Id* at p. 353-354.

[32] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806; *Runyan, supra,* 40 Cal.App.4th 961, 965.

[33] *Doyle v. City of Chino* (1981) 117 Cal. App. 3d 673, 684. In addition, the court in *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. *(Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d *340; Murden, supra).*

[34] The Commission noted that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (Doyle, *supra,* 117 Cal.App. 3d *673; Henneberque, supra,* 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." *(White, supra,* 31 Cal.3d 676.)

The Commission agreed that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the Commission found that test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

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Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

Thus, the Commission found that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the Commission determined that the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal

under the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

The Commission found, however, that the due process clauses of the United States and California Constitutions do not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e. ; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, the Cornmission found that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Governrnent Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[35]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contended that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant stated the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section.

[35] Gov. Code, § 3303, subd. (i).

> Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section. "

The Commission agreed. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, the Commission found that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Governrnent Code section 175 14.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

The Commission recognized that under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[36] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, the Commission found that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part the following:

> "The complete interrogation of a public safety officer may be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation. " (Emphasis added.)

The claimant contended that the activity of tape recording the interrogation and providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitute reimbursable state mandated activities. The claimant stated the following:

[36] *Skelly, supra,* 15 Cal.3d 194.

> "As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings. "[37]

At the hearing, Ms. Dee Contreras, Director of Labor Relations for the City of Sacramento, testified as follows:

> "If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do no have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective. "
>
> "If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have. "
>
> "So it is essentially -- it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape. "[38]

The Department of Finance disagreed and contended that the test claim statute does not require local agencies to tape the interrogation. The Department further contended that if the local agency decides to tape the interrogation, the cost of providing the tape to the officer is required under the due process clause.

Based on the evidence presented at the hearing, the Commission recognized the reality faced by labor relations' professionals in their implementation of the test claim legislation. Accordingly, the Commission found that tape recording the interrogation when the employee records the interrogation is a mandatory activity to ensure that all parties have an accurate record. The Commission's finding is also consistent with the legislative intent to assure stable employer-employee relations are continued throughout the state and that effective services are provided to the people. [39]

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[37] Claimant's comments to Draft Staff Analysis.

[38] August 26, 1999 Hearing Transcript, page 18, lines 7-2 1.

[39] This finding is consistent with one of the principles of statutory construction that "where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory. " (3 Sutherland, Statutory Construction (5th ed. 1992) § 57.14, p. 36.) See also section 1183.1 of the Commission's regulations, which provides that the parameters and guidelines adopted on a mandated program shall provide a description of the most reasonable methods of complying with the mandate.

The Commission also recognized that Government Code section 3303, subdivision (g), requires that the employee shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The Commission found that providing the employee with access to the tape *prior to a further interrogation at a subsequent time* is a new activity and, thus, constitutes a new program or higher level of service.

However, the Commission found that providing the employee with access to the tape *if further proceedings are contemplated* does not constitute a new program or higher level of service when the further proceeding is a disciplinary action protected by the due process clause. Under certain circumstances, due process already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

Accordingly, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation to the employee when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[40]; and when
- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the Commission found that the requirement to provide access to the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing access to the tape recording merely implements the requirements of the United States Constitution.

However, when the further proceeding does not constitute a disciplinary action protected by due process, the Commission found that providing the employee with access to the tape is a new activity and, thus, constitutes a new program or higher level of service.

In sum, the Commission found that the following activities constitute reimbursable state mandated activities :

- Tape recording the interrogation when the employee records the interrogation.
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) The further proceeding is not a disciplinary action;

[40] *Skelly, supra; Ng, supra; Civil Service Assn., supra; Stanton, supra; Murden, supra.*

(b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);

(c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

(d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

(e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contended that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association,* the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with misconduct .[41] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation. [42]

The Commission recognized that the court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct .[43]

Accordingly, even in the absence of the test claim legislation, the Commission found that the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

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[41] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[42] *Id.* at 579.

[43] *Skelly, supra.*

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, the Commission found that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e. ; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment) ;
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagreed with this conclusion. They contended that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Governrnent Code section 3303, subdivision (g), does not constitute a reirnbursable state mandated program with respect to these employees. However, they cited no authority for this proposition.

The Department of Finance and the State Personnel Board also contended that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier, the Commission disagreed with this contention and found that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, the Commission found that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 175 14.

Representation at Interrogation

Governrnent Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contended that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.

The Commission disagreed with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 35 10, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers .[44]

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in Civil Service *Association* v. *City and County of San Francisco,* a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. *(Steen v. Board of Civil Service Commr.* (1945) 26 Cal.2d 7 16, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen.* "[45]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[46]

Based on the foregoing, the Commission found that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new

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[44] *Santa Clara County Dist. Attorney Investigators Assn. v. County of Santa Clara (1975)* 51 Cal.App.3d 255.

[45] *Civil Service Assn., supra, 22* Cal.3d 552, 568.

[46] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Cornrnents in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[47] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer ""shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, the Cornmission determined that Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[48]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contended that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 3 1011. The claimant further stated that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse connnents. Thus, the claimant contended that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

As described below, the Comrnission found that Government Code sections 3305 and 3306 constitute a ***partial*** reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[49] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprirnand for a

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[47] The court in *Aguilar v. Johnson* (1988) 202 Cal. App. 3d 24 1, 249-252, held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[48] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment.*" Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[49] *Skelly, supra,* 15 Cal.3d 194.

permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[50] Under such circumstances, the Cornmission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Cormnission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, the Cornrnission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Department of Finance and the State Personnel Board stated the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear. "

The Cornmission agreed that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, the Cornmission found that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

Existing Statutory Law Relating to Counties

Government Code section 3 101 1 , enacted in 1974,[51] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance

[50] *Hopson, supra,* 139 Cal.App.3d 347.

[51] Stats. 1974, c. 315.

concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.

The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.

The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.

This section does not apply to the records ***of*** *an employee relating to the investigation* ***of*** *a possible criminal offense.* " (Emphasis added .)

Therefore, the Commission determined that under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[52] Under such circumstances, the Commission found that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or'higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 175 14.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose '"costs mandated by the state" under Government Code section 175 14:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or

[52] The Commission found that Government Code section 3 1011 does *not* impose a notice requirement on counties since section 3 10 11 does not require the county employee to review the comment *before the* comment is placed in the personnel file.

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975 ,[53] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.* It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or cornmission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or cornmission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not apply to public school districts with respect to employees covered by Section 4403 1 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information. "[54] (Emphasis added.)

Therefore, the Commission determined that under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the

[53] Stats. 1975, c. 908, § 1.

[54] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses.. . "

comment *does not* relate to the investigation of a possible criminal offense? Under such circumstances, the Commission found that the review provisions of Governrnent Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 175 14.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 175 14:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 4403 1 establishes notice, review and response protections to peace officers employed by school districts. Section 4403 1 provides in relevant part the following:

> "(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> "(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right

[55] The Commission found that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

to enter, and have attached to any derogatory statement, his own comments thereon.. . .” (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees. [56]

Therefore, the Comrnission determined that existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was* not obtained in connection with a promotional examination. Under such circumstances, the Commission found that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the Cornmission found that the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer’s refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose ‘“costs mandated by the state” under Government Code section 175 14.

Furthermore, the Commission found that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose “costs mandated by the state” under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer’s refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

CONCLUSION

[56] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

Based on the foregoing analysis, the Comrnission concluded that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (i.e. ; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

4. Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

5. Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

   (a) The further proceeding is not a disciplinary action;

   (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);

   (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishrnent;

   (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

   (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

6. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

   (a) When the investigation *does not* result in disciplinary action; and

   (b) When the investigation results in:

   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest is *not* affected (i.e. ; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employee for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

6. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

   School Districts

   (a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

   - Obtaining the signature of the peace officer on the adverse comment; or
   - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

   (b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

   - Providing notice of the adverse comment;
   - Providing an opportunity to review and sign the adverse comment;
   - Providing an opportunity to respond to the adverse comment within 30 days; and
   - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment is related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities :

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.